89-1272

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,
Petitioners,
v.
SAMUEL K. SKINNER,
Secretary of Transportation,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Does the Department of Transportation's "Drug-Free Departmental Workplace" program violate the Fourth Amendment's prohibition against unreasonable searches and seizures, insofar as that program requires thousands of the Department's employees, as a condition of their continued employment, to submit to a permanent regime of suspicionless, random, unannounced, repeated and closely-monitored urine collection drug testing?

LIST OF PARTIES TO THE PROCEEDING

The petitioners in this proceeding, and in the proceedings below, are the American Federation of Government Employees, AFL-CIO, ("AFGE"), AFGE Local 3313, AFGE Local 2814, Caleb Butler, and James Dawkins. The respondent in this proceeding, and below, is Samuel K. Skinner, Secretary of Transportation, in his official capacity. There are no other parties.

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Petitioners, American Federation of Government Employees, *et al.*, plaintiffs in the district court and appellants in the court of appeals, respectfully petition this Court to issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit to review the decision and judgment in *AFGE v. Skinner*, 885 F.2d 884 (D.C. Cir. No. 87-5417; September 8, 1989).

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 885 F.2d 884 and is reprinted in the separate appendix to this petition ("Pet. App.") at 1a-28a. The memorandum and order of the District Court for the District of Columbia is reported at 670 F.Supp. 445 and is reprinted at Pet. App. 29a-37a.

JURISDICTION

The judgment of the court of appeals was issued on September 8, 1989. On November 28, 1989, the time for filing a petition for a writ of *certiorari* was extended by the Chief Justice to and including January 8, 1990. On December 28, 1989, the time for filing a petition for a writ of *certiorari* was further extended by the Chief Justice to and including February 7, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

United States Department of Transportation ("DOT") Order 3910.1, entitled "Drug-Free Departmental Workplace" and dated June 29, 1987, is reprinted at Pet. App. 38a-95a.

STATEMENT OF THE CASE

A. Statement of Facts

On September 15, 1986, then President Reagan signed Executive Order 12564, 51 Fed. Reg. 32889 (September 17, 1986), which directs executive-branch agencies to establish programs to test federal employees in "sensitive positions" for the use of illegal drugs. The Executive Order does not specifically direct agencies to require "random" or "unannounced" urine collection drug tests; rather, that Order generally left the "criteria for [drug]

testing" and the "extent" of such testing up to the discretion of each agency's head.

On June 29, 1987, pursuant to this Executive Order, then-Secretary of Transportation Dole adopted DOT Order 3910.1, a highly detailed plan mandating that the DOT's approximately 62,000 employees undergo various forms of urine collection drug testing. Among the "types of testing" mandated by Order 3910.1 is a requirement of "random testing" which applies to approximately 30,000 DOT employees, who, in the DOT's view, are "safety [or] security critical." Pet. App. 52a.[1]

Pursuant to this random testing requirement, each of these 30,000 DOT employees is subject to a new and permanent regime of monitored urine collection drug testing conducted on an entirely *random, unannounced and repetitive* basis.[2] Any covered employee who does not

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[1] DOT's drug-testing program also requires a variety of other "types of testing," which include: (1) "periodic testing," under which employees who are otherwise required to undergo periodic medical exams must include a drug test in the exams; (2) "reasonable suspicion testing," under which employees can be tested when management has reasonable cause to suspect use of illegal drugs; (3) "pre-employment/pre-appointment testing," under which applicants to certain positions must be tested prior to beginning in those positions; (4) "accident or unsafe practice testing," under which employees must be tested whenever their behavior may have caused an accident or safety violation; and (5) "follow-up testing," under which employees who have previously been temporarily removed from their positions for illegal drug use must be tested after completing a rehabilitation program and returning to service. Pet. App. 53a-54a.

[2] The wide variety of job categories covered by the DOT random testing plan includes the following: "motor vehicle operators; criminal investigators; vessel traffic controllers; air traffic controllers; mechanics (general, maintenance, electronic, instrument, aircraft oxygen equipment, aircraft engine); aircraft electricians; inspectors (metals, aviation, railroad safety series); transportation equipment operation family; pilots (master, inspection/flight test); civil aviation security specialists, safety specialists (highway, motor

fully comply and cooperate with a random and surprise demand to report immediately for a monitored urine collection session—in which the employee's moment-to-moment actions are rigorously controlled, *see infra* n.11, p.11—is subject to being terminated from federal employment. Pet. App. 71a.

The DOT's random testing requirement is *not* based on any evidence that drug abuse by employees in the covered positions has ever caused any significant accident. Nor is there any evidence of any extensive drug abuse by such employees. On September 7, 1987, the DOT testing plan set out in Order 3910.1 went into effect.[3] Subsequent test results confirm that the level of drug use among those employees covered by the random testing requirement is exceedingly low.[4]

B. Statement of Proceedings Below

On July 7, 1987, this action challenging the constitutionality of the DOT random drug testing program and seeking declaratory and injunctive relief was filed in the

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carrier, railroad, safety engineer); engineers (general, civil, mechanical, electrical, chemical); firefighters; nurses; shipwright foremen; chief engineers (ferryboat); oiler (ferryboat and diesel); electronics technicians; industrial hygienists; transportation specialists; lock and dam operators". Pet. App. 10a n.8.

The DOT asserts that each of these positions bears "a direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security." Pet. App. 52a.

[3] Procedures for the operation of the testing program are also governed by the Department of Health and Human Services ("HHS") guidelines which were issued subsequent to the effective date of the DOT program to govern all federal workplace drug testing. *See*, HHS, *Guidelines for Federal Workplace Drug Testing Programs*, 53 Fed. Reg. 11,970 (April 11, 1988) ("HHS Guidelines").

[4] From January 1, 1988 to April 30, 1989, the DOT conducted 15,352 random tests and 39 of these tests produced positive results (0.6%), with evidence of marijuana use accounting for two thirds of the positive results. DOT, *Drug-Free Workplace Program Evaluation Report* (September 1989) at 16.

United States District Court for the District of Columbia. The plaintiffs (petitioners in this Court)—labor organizations representing DOT employees covered by the random program and two individual covered employees—contended both that the overall program constitutes an unreasonable search and seizure in violation of the Fourth Amendment, and, in the alternative, that the program is unconstitutional in its coverage of employees whose job positions are not, in fact, in sufficiently safety- or security-critical jobs to justify their inclusion.[5]

The Government filed an answer on July 15, 1987, and a motion for summary judgment on July 30, 1987. On August 21, 1987, petitioners filed a motion for a preliminary injunction with their response to the Government's summary judgment motion. District Judge Gesell, in an order dated September 30, 1987, accompanied by a brief opinion, granted the Government's motion for summary judgment and denied petitioners' motion for a preliminary injunction because "on balance, the preponderance of the proof supports the reasonableness of the random plan." Pet. App. 36a.[6]

The petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit. Prior to a decision on that appeal, this Court issued its decisions in *Skinner v. Railway Labor Executives' Association*, —— U.S. ——, 57 L.W. 4324 (March 21, 1989) and *National*

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[5] Specifically, petitioners contended that the positions of motor vehicle operators, Federal Railroad Administration ("FRA") hazardous materials inspector, and Federal Aviation Administration ("FAA") aircraft mechanic, are not sufficient safety- or security-sensitive jobs to justify their inclusion in the random testing program.

[6] Although the district court granted summary judgment on the claim that certain specified job categories are insufficiently sensitive for inclusion in the random testing plan, that court also noted that at this stage of the litigation, the evidence on these jobs was "sparse". Accordingly, that court specified that its decision would not preclude "later, more specific challenge[s] clearly directed to a [specific] job category." Pet. App. 36a.

Treasury Employees Union v. von Raab, —— U.S. ——, 57 L.W. 4338 (March 21, 1989). In *Skinner*, the Court upheld a program of post-accident drug testing of railway workers, and, in *von Raab*, the Court upheld a program of pre-employment drug testing of customs agents. Based on *Skinner* and *von Raab*, the court of appeals affirmed the district court's decision in this case.

Although *Skinner* and *von Raab* did *not* involve any program of random, unannounced and repetitive drug testing, Judge Sentelle, writing for the court of appeals, concluded that no legal difference between random testing and other types of testing "compels 'a fundamentally different analysis from that pursued'" in *Skinner* and *von Raab*. Pet. App. 13a (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 489 (D.C. Cir. 1989)). In random drug testing cases, said the court below, "[t]he balance we strike [between privacy interests and public needs] is substantially identical to that struck by the Supreme Court in *Skinner*." Pet. App. 10a. Affirmance of the district court was thus justified, Judge Sentelle concluded, because, although "random testing may increase employee anxiety and invasion of subjective expectations of privacy," such testing "also limits discretion in the selection process and presumably enhances drug-use deterrence."[7] Pet. App. 13a.

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[7] The court of appeals also rejected petitioners' contentions regarding the inclusion of specific job categories in the random program. Pet. App. 14a-18a. We do not seek review of that ruling in this petition.

REASONS FOR GRANTING THE WRIT

The question presented by this *certiorari* petition—the constitutionality of a government requirement that certain employees, as a condition of employment, submit to a permanent regime of suspicionless, unannounced, random, repetitive and closely-monitored urine collection drug testing—is of the first magnitude.

Very simply stated, such suspicionless testing programs work *far deeper and far more pervasive intrusions into personal privacy and dignity than any suspicionless searches this Court has ever validated. See infra* at pp. 9-14. Nonetheless, all levels of government are increasingly mandating such programs. In the federal sector alone, over 345,000 federal employees are now subject to such tesitng programs.[8] The DOT, in addition, requires almost 4 million private sector employees in the commercial transportation industries to submit to random drug testing regimes quite similar to the regime at issue here.[9]

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[8] *See* Havermann, *U.S. Details Plans For Drug Tests*, Washington Post (May 4, 1988) at A1 (over 345,000 federal employees subject to random testing); *see also* Office of Workplace Initiative, National Institute on Drug Abuse, *Report to Congress: Federal Agency Drug-Free Workplace Programs, Tier I Agencies* (March 29, 1988).

[9] For the DOT requirements, see BNA, National Report on Substance Abuse (November 23, 1988) at 1 (approximately 3,864,500 private sector transportation employees subject to random testing). *See also* DOT, Coast Guard, *Programs for Chemical Drug and Alcohol Testing of Commercial Vessel Personnel*, 53 Fed. Reg. 47064 (November 21, 1988) (requiring random drug testing of employees in commercial maritime industry); DOT, Federal Aviation Administration, *Anti-Drug Program for Personnel Engaged in Specified Aviation Activities*, 53 Fed. Reg. 47024 (November 21, 1988) (requiring random drug testing of employees in commercial aviation industry); DOT Federal Highway Administration, *Controlled Substance Testing*, 53 Fed. Reg. 47134 (November 21, 1988) (requiring random drug testing of employees in motor carriage industry); DOT Federal Railroad Administration, *Random Drug Testings; Amendments to Alcohol/Drug Regulations*, 53 Fed. Reg. 47102 (November 21, 1988) (requiring random drug testing of employees

And these employees are only a fraction of the total number being subjected to random urine collection requirements.[10]

By any fair measure, then, these recently instituted government drug testing programs constitute a radical expansion of government power over the individual. Yet the courts of appeals have been validating these programs *without any close judicial examination* of the unique Fourth Amendment issues that such suspicionless, unannounced, random, and repetitive searches pose. In so doing those courts, including the court below, have simply assumed—or have simply asserted—that this Court's decisions in *Skinner v. Railway Labor Executives' Association*, *supra*, and *National Treasury Employees Union v. von Raab*, *supra*, dispositively settle the constitutionality of *random* drug testing programs.

But *Skinner* and *von Raab* did *not* concern comparable testing programs and there is *nothing* in this Court's opinions squarely confronting the sensitive and difficult legal issues posed here. Thus, these massive and unique programs, which govern the working lives of millions, are

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in railroad industry); DOT, Research and Special Programs Administration, *Control of Drug Use in Natural Gas, Liquified Natural Gas and Hazardous Liquid Pipeline Operations*, 53 Fed. Reg. 47084 (November 21, 1988) (requiring random drug testing of employees in pipeline industry).

[10] The Department of Defense, for example, requires that a large number of the employees of private defense contractors be subjected to random drug testing regimes. *See* Department of Defense, *Federal Acquisitions Regulation Supplement; Drug-Free Work Force*, 53 Fed. Reg. 37763 (September 28, 1988), supplemented by *Questions and Answers Prepared by Defense Department on Drug Free Workplace Regulations for Federal Contractors*, BNA Daily Labor Report (April 10, 1989) at G-1 (requiring random drug testing of employees of defense contractors).

In addition, as the litigated cases indicate, hundreds of state and local governments impose random drug testing requirements on their employees.

being approved and enforced without ever being subjected to serious judicial analysis.

In large part the legitimacy—and the moral force—of judicial review rests on the assurance that the courts in interpreting the Constitution will engage in reasoned and principled decision making. Approval of the widespread, highly intrusive search programs at issue here on the basis of lower court speculations on how far this Court intended to move the Fourth Amendment law in its *Skinner* and *von Raab* opinions does not, we submit, constitute such decision making.

In sum, the decision as to whether the government may constitutionally require that individuals who are not suspected of any wrongdoing are to be subject to random, unannounced, and repeated drug testing should not be treated as a decision arrived at *sub silentio* in *Skinner* and *von Raab*. Rather, it is an open issue that should be decided by this Court after squarely confronting the unique aspects of these unprecedented testing programs.

I. Government Programs Of Mandatory Drug Testing On A Random, Unannounced And Repetitive Basis Work Intrusions Into Privacy That Are Substantially Greater Than Those In *Skinner* And *van Raab* And Thus Present Important And Unresolved Fourth Amendment Issues.

A. In his argument to this Court in *von Raab*, then-Solicitor General Charles Fried made explicit that the pre-employment testing program at issue in that case presented a legal question quite different from the question that is presented here:

> [T]he random kind of testing . . . is not before you. * * *
>
> If we have a case in which a much larger population is tested or where the method is random drug testing, then I would hope the Court will consider that case on the record that will then be established

> after it has been sorted over and digested by courts below. But we ask neither that we get a hint or a signal helping us out in those cases, but we hope that nothing will be said to preclude them either. That really lies in the future. [Transcript of Oral Argument, *von Raab*, *supra*, at 42-43 (November 2, 1988).]

Similarly, Attorney General Richard Thornburgh, in arguing *Skinner*, stressed that post-accident testing presented a far different legal issue than that presented here:

> I think it's significant to note that the regulations did not call for the testing of all employees or for periodic random testing procedures. They were tied instead to specific events . . . defined by objective standards. [Transcript of Oral Argument, *Skinner*, *supra*, at 13 (November 2, 1988).]

The government, in presenting *Skinner* and *von Raab*, in other words, clearly understood that programs like the one now at issue work much more substantial intrusions into privacy than the testing programs challenged in those cases. And the government further understood that this difference in intrusiveness is of constitutional significance since the precondition to a suspicionless search program is that the search involve no more than a "minimal" intrusion into privacy. *See New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.8 (1985) ("exceptions to the requirement of individualized suspicion are generally appropriate *only* where the privacy interests implicated are minimal"). Indeed, this principle was explicitly reaffirmed in *Skinner* and *von Raab*:

> In limited circumstances, *where the privacy interests implicated by the search are minimal* and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of [individualized] suspicion. [*Skinner*, 57 L.W. at 4330 (emphasis

added); *see also von Raab*, 57 L.W. at 4342-4343 n.2 & 4344 n.4 (noting factors in particular search program that "reduc[e] to a minimum any unsettling shows of authority" and "significantly minimize the intrusiveness of the . . . drug screening program" at issue).]

Thus, the *Skinner* and *von Raab* decisions rest on this Court's conclusion that the programs there could properly be deemed to be no more than "minimally intrusive." And, in *Skinner*, the Court went on to caution that precisely because such tests "require employees to perform an excretory function traditionally shielded by great privacy," the intrusions of drug testing programs into personal privacy will "*not* [be] characterize[d] . . . as minimal in most contexsts." 57 L.W. at 4330 (emphasis added).[11]

B. The drug testing program at issue here is vastly more intrusive into privacy than the programs that this Court sustained in *Skinner* and *von Raab*. Since the governing legal standard is that such programs are constitutional only if the program works no more than a minimal intrusion on privacy, it follows that *Skinner* and *von Raab* cannot be viewed as having decided this case.

The DOT plan requires a regime of monitored urine testing in which, at any time, "all covered employees will

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[11] As this Court explained, the individual's feelings of concern and indignity when confronted with government demands for monitored urine test are entirely reasonable:

> "There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." . . . [T]he collection and testing of urine [therefore] intrudes upon expectations of privacy that society has long recognized as reasonable. [*Skinner*, 57 L.W. at 4328 (quoting *National Treasury Employees Union v. von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).]

have an equal statistical chance of being selected for testing." Pet. App. 52a. Testing may occur "on any scheduled workday." *Id.* And all random testing must be entirely "unannounced." *Id.* Put simply, each employee will continue to be subject to random selection for the remainder of her worklife, regardless of how often she has been tested, how uniformly innocent her prior tests, or how unblemished her work and health records. And, any employee who fails to cooperate with the program is subject to discharge. Pet. App. 71a.[12]

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[12] Once selected, an employee must follow a rigidly prescribed and scrutinized course of conduct relating to the giving of a urine sample.

Upon selection, she must immediately report to a "collection site," which may be a public restroom or other area which DOT has designated and "secure[d]" to assure that "[n]o unauthorized personnel [are] permitted." At this site, a "collection site person" will scrutinize the employee's conduct. HHS guidelines, *supra*, 53 Fed. Reg. at 11980.

Upon arrival, the employee must: (1) "present some type of photo identification" to the "collection site person"; (2) fill out a "pre-test information form" which elicits "information regarding [any] drugs an employee uses which may affect the outcome of the test"; (3) remove her "unnecessary outer garments (e.g., coat, jacket) that might conceal items or substances that could be used to tamper with or adulterate [a] urine specimen"; (4) leave any personal belongings (other than a wallet) with the "collection site person"; (5) wash and dry her hands; and (6) stand in the presence of the "collection site person" in a location that does not provide "access to water fountains, faucets, soap dispensers, or cleaning agents or other materials which could be used to adulterate the specimen." *Id.* at 11980-11981.

The employee is then supplied with a "disposable specimen container" and is normally permitted to urinate into this container outside of the direct observation of the "collection site person"—*viz.*, in the privacy of a bathroom stall or other partitioned area—although the act must be done in sufficiently close physical proximity to the "collection site person" so that any "unusual behavior" by the employee can be noted. *Id.* at 11981.

The employee must provide the specimen to the "collection site person," who will determine if it is of sufficient volume and within the normal temperature range. If the specimen is not of sufficient

Such a program works a significantly more intrusive invasion on employee privacy than *Skinner's* post-accident program or *von Raab's* pre-employment program in at least two critical regards.

First, under post-accident and pre-employment testing, a urine collection test will be a rare (and possibly even a one-time) event in an employee's worklife. In contrast, the very essence of the DOT program is the requirement of repeated urine collections and testing of each covered employee throughout her working life. The program here establishes a regime under which invasive demands and the apprehension of such demands are—and henceforth will be—a recurrent and ever-present part of every covered employee's work day.

Second, unlike pre-employment or post-accident testing, the testing in this case is entirely a function of the fact that the employee has chosen to pursue a certain occupation; the testing is not triggered by any more proximate or individualized events or decisions that might rationally justify to an employee why she must submit to the government's repeated testing demands. Given the fact that monitored urine testing is uniquely objectionable to many individuals precisely because the test is widely perceived as dehumanizing, the absence of any individualized reason for the testing demands further increases the affront. *Compare Skinner*, *supra* (testing based on one's involvement in a serious accident that one may have caused); *von Raab*, *supra* (testing prior to beginning new safety related job after applying to job with knowledge of testing requirement).

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volume, the employee will be required to "drink fluids to facilitate urination" and, if necessary, to "remain at the test site for [up to] 2 hours" until a sufficient specimen is obtained. Any employee's "inability . . . to provide the necessary specimen" is "treated as a refusal" by the employee to cooperate with the test. If the specimen is not within the normal temperature range, the employee will be required to urinate again, this time under the direct observation of the "collection site person." Pet. App. 61a; 53 Fed. Reg. 11981.

The inherently intrusive nature of random urine testing, moreover, is substantially exacerbated by the fact that the DOT requires that each test here be unannounced. It is too plain for argument that the absence of advance notice of an anxiety-producing search is a factor of major significance in heightening its intrusiveness. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-559 (1976) (preventing surprise reduces intrusion); *Wyman v. James*, 400 U.S. 309, 320 (1971) (same).

Here, the affected employee is yanked from her normal routine without an opportunity to prepare emotionally, and the program's design thereby dramatically increases the inherent tendency of drug testing to cause indignity, fright, and concern. *See von Raab, supra*, 57 L.W. at 4342, n.2. (intrusiveness of pre-employment drug test was "significantly minimize[d]," because job applicants are "notified [five days] in advance of the scheduled sample collection"). Given the lack of any rational public need for eliminating advanced warning, this aspect of the program must be viewed as an especially egregious government invasion of reasonable privacy expectations.

C. Taken together, these factors make clear that the purpose and effect of the DOT drug testing program is to create in each and every individual who works in a covered occupation a realistic, continuing, and ever-present apprehension that at any moment, and without reason or warning, she may be subjected to a highly invasive urine collection demand.

While we believe that the intrusiveness of such a program simply cannot be deemed "minimal"—and that the program is therefore unconstitutional—for present purposes it is enough that these factors certainly render the program legally distinct from those at issue in *Skinner* and *von Raab*. Since millions are now being subject to such constitutionally controversial programs, this case raises a substantial question that should be resolved by this Court.

II. The Courts Of Appeals—Including The Court Below—Have Erroneously Assumed That *Skinner* And *von Raab* Decided The Validity Of Random, Unannounced And Repetitive Drug Testing And They Are Thus Not Independently Examining The Issue.

A. The panel below had no occasion to state its reasoning at length since the Court of Appeals for the District of Columbia Circuit had already determined its position on random testing. *See Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied sub nom. Bell v. Thornburgh*, —— U.S. —— (January 22, 1990).[13] But an examination of *Harmon* reveals that in that case, too, the court of appeals engaged in no serious analysis; rather, *Harmon* sustained a random testing program simply on the strength of *Skinner* and *von Raab*.

The *Harmon* panel began its discussion of random testing by complaining that neither *Skinner* nor *von Raab* state a clear rule for distinguishing "legitimate drug-testing programs . . . from illegitimate ones," 878 F.2d at 488, and by suggesting that "[t]he invasion of privacy occasioned by [random and repetitive programs] might . . . be regarded as different in kind from the intrusion at issue" in those cases, *id.* Indeed, the *Harmon* panel expressly recognized that "a coherent theory might be constructed which would make [random and repetitive selection] a fundamental distinction." *Id.* at 489. But *Harmon* then rejects this possibility with the conclusory statement that "the Supreme Court has not encouraged the construction of such a theory." *Id.* The principal

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[13] Virtually the entire discussion of the issue in the court of appeals' decision below was as follows:

> While it is true that the regulations sustained in *Skinner* required testing only after a triggering event . . . we do not find that . . . [this] fact[] compels "a fundamentally different analysis from that pursued by the Supreme Court." *Harmon*, 878 F.2d at 489. While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence. [Pet. App. 12a-13a.]

basis given for this conclusion is that in *von Raab* much of the discussion of the need for minimizing the intrusiveness of testing "was confined to a footnote." *Id.* (citing *von Raab*, 57 L.W. at 4342 n.2).

Given this treatment, it is clear that the court below has never given independent, reasoned consideration to the substantial constitutional issues in this case, but has instead assumed that those issues were decided *sub silentio* in *Skinner* and *von Raab*.

The Court of Appeals for the District of Columbia Circuit is not alone in its failure to confront the question presented here. Its method of approach—that *Skinner* and *von Raab* should be read as broadly validating random testing programs—is the one that the lower courts are routinely following.

For example, the Fourth Circuit, in *Thompson v. Marsh*, 884 F.2d 113, 114 (4th Cir. 1989), recently issued a brief *per curiam* opinion stating simply—and erroneously—that in *Skinner* and *von Raab* "the Supreme Court decided that random drug tests do not violate the Fourth Amendment." And the Seventh Circuit recently disposed of a similar case simply by noting *Harmon* and the instant case with apparent approval. *See, Taylor v. O'Grady*, 888 F.2d 1189, 1198, 1200-1201 (7th Cir. 1989).[14]

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[14] The Seventh Circuit's *Taylor* decision does not actually reach the specific issue of the validity of random drug testing programs such as the instant one; rather the testing program in *Taylor* was one in which each employee was required to submit annually to a surprise testing demand. *See Taylor, supra*, 888 F.2d at 1198.

The law in the First Circuit, although not entirely clear, may also take *Skinner* and *von Raab* as having decided the constitutionality of random testing. In *Guiney v. Roache*, 873 F.2d 1557 (1st Cir. 1989), *cert. denied*, —— U.S. —— (November 13, 1989) that court remanded a random testing case back to the district court for disposition in light of *Skinner* and *von Raab*. Although the opinion's wording does not make clear the First Circuit's view of whether the random testing issue was decided, both parties seem to have construed the opinion as holding that further

For the reasons already given, *supra* pp. 9-14, the judgment as to whether the Constitution permits widespread, suspicionless, unannounced searches of the kind at issue here is one that should be rendered after this Court has squarely confronted that question and not on the basis of a lower court's intuition on how far the *Skinner* and *von Raab* opinions are to be extended. Fidelity to the Fourth Amendment demands no less—and as we will show in the full briefing of this case—in fact demands far more.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of *certiorari* to review the decision of the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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challenge on the issue was foreclosed by this Court's decisions. *See* Petition for Certiorari, *Guiney v. Roache*, No. 89-205; Respondent's Brief in Opposition, *Guiney v. Roache*, *supra*.

The Third and Eighth Circuit had explicitly upheld random testing programs prior to this Court's *Skinner* and *von Raab* decisions. *See Transport Workers Union, Local 234 v. SEPTA*, 884 F.2d 709 (3d Cir. 1989) (upholding random testing program based on pre-*Skinner* and pre-*von Raab* law of the circuit); *Rushton v. Nebraska Public Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (upholding random testing program based on rationale different from that adopted in *Skinner* and *von Raab*).